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Blowing the Whistle Louder

Ruling could increase fraud claims against government contractors

BY RICHARD C. REUBEN

Amid the continuing national debate over deficit reduction, a case before the U.S. Supreme Court has multibillion-dollar ramifications in fraud recoveries for the federal government.

At issue in *Hughes Aircraft Co. v. United States ex rel. Schumer*, No. 95-1340, is the reach of the U.S. False Claims Act, 31 U.S.C. § 3729, *et seq.*, which permits private parties to bring whistleblower lawsuits—also called "qui tam" actions—against companies that allegedly are defrauding the government.

But they can only bring such actions if the information they present about alleged fraud has not already been "publicly disclosed." The lower federal courts are unclear, however, on just what "public disclosure" means for purposes of this limitation, and the U.S. Supreme Court could resolve the confusion in *Hughes*. The case was argued Feb. 25.

The stakes in the outcome are high. Government estimates put the cost of fraud in defense contracting, construction, health care reimbursements, and other government procurement and contracting at well over $10 billion annually.

Qui Tam is Key

The qui tam provisions of the False Claims Act have been particularly instrumental in recovering some of this money since the century-old law was amended in 1986 to make it easier, and more financially rewarding, for private parties to supplement the government's anti-fraud efforts with their own private causes of action.

The amendments also provided for triple damages to encourage private parties to risk coming forward with information, and guaranteed legal fees of 15 percent to prompt lawyers to take on the difficult, time-consuming and expensive cases.

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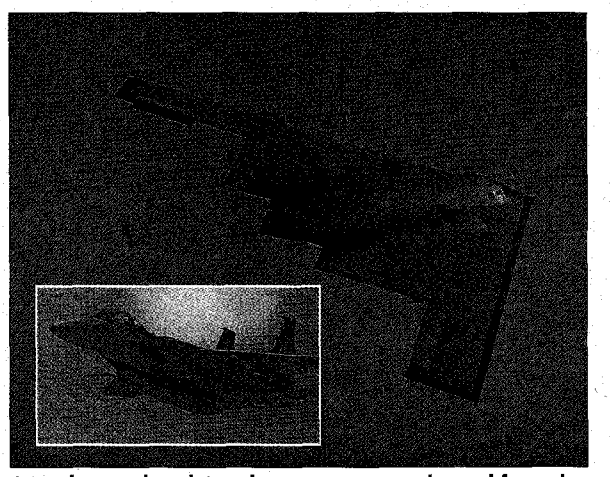
With such incentives, the number of private actions under the False Claims Act jumped from 33 in 1987 to 360 in 1996, according to U.S. Justice Department statistics.

Qui tam actions led to nearly $1.5 billion in recoveries during 1996 alone. A report prepared for Taxpayers Against Fraud, The False Claims Act Legal Center in Washington, D.C., predicts that fraud recoveries under the act will exceed $24 billion in the next decade—with nearly a third of that expected to emanate from private qui tam suits. The report also forecasts that the qui tam provisions could deter another $210 billion in fraud over the next 10 years.



A Hughes worker claims the contractor overcharged for radar systems in the B-2 stealth bomber and the F-15 fighter (inset).

AP PHOTOS

But government contractors contend the amendments opened the door to parasitic lawsuits built on fabricated or marginal cases. They would welcome a broad definition of public disclosure that would, in effect, bar many private actions.

But "a broad definition of 'public disclosure' would destroy the ability of the government to enlist such private helpers in ferreting out fraud in those situations, and would effectively hamstring the act," says Charles Tiefer, a professor at the University of Baltimore School of Law, who wrote an amicus brief in *Hughes* for the Project on Government Oversight.

Hughes arises from accusations by William J. Schumer, a Hughes employee, that the company's technical accounting procedures as a subcontractor on two weapons projects were improper and ultimately defrauded the government.

Hughes, however, contends that Schumer's action should be barred. The questionable accounting practice was revealed by a government audit before passage of the amendments, which, Hughes argues, do not apply retroactively.

Moreover, the aircraft company contends that, even if the amendments are retroactive, Schumer lacks standing to bring a qui tam action since his suit is based on allegations already disclosed by the government after its audit, rather than on information for which he was the original source.

Pursuing that argument before the Court, lawyers for Hughes are asking the justices to adopt a broad definition of public disclosure that would preclude employees of government contractors from bringing qui tam suits unless they are directly involved in the fraud. (The lead attorney for Hughes is Kenneth W. Starr of Kirkland & Ellis in Washington, D.C., who serves on the *ABA Journal* Board of Editors. Individual board members have no role in the selection or preparation of articles for the magazine.)

Schumer's lawyers, led by David Silberman of Bredhoff & Kaiser in Washington, D.C., are urging a much narrower view of the public disclosure bar, an approach supported by the Clinton administration. In their view, public disclosure means broad dissemination to the public, such as through the media.

Despite the Supreme Court's well-known proclivity for narrow rulings, and the possibility of ducking the public disclosure issue on other grounds, experts say such bobbing and weaving can last only so long, as qui tam filings increase and the defense bar continues to fight back. ■